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IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1956

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

vs.

UTAH LABOR RELATIONS BOARD

APPEAL FROM THE SUPREME COURT
OF THE
STATE OF UTAH

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UTAH LABOR RELATIONS BOARD

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STATE OF UTAH

OPINION BELOW

The opinion of the Supreme Court of Utah is reported at 296 P. 2d 733. No opinion was entered with the order denying rehearing.

JURISDICTION

The judgment of the Supreme Court of Utah was entered April 30, 1956 and the order denying rehearing on June 4, 1956. Notice of appeal was filed in the Supreme Court of Utah on June 14, 1956. Probable jurisdiction was noted October 8, 1956.

Jurisdiction of this court rests on Title 28, U.S.C., § 1257 (2).

STATUTES INVOLVED

Sections 34-1-8 and 9, Utah Code Annotated, 1953, the pertinent provision of the Utah Labor Relations Act, and sections 8, 9 and 10(a) of the National Labor Relations Act, 61 Stat. 146, 29 U.S.C. 158-160(a), are set forth as Appendix "A" hereto.

THE QUESTION PRESENTED

Whether the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. § 151-168), Article VI clause 2 and Article I, sec. 8 of the Constitution of the United States preclude the Utah Labor Relations Board from asserting jurisdiction over an unfair labor practice charge filed under state law against appellants who is engaged in a manufacturing business affecting interstate commerces where the National Labor Relations Board has previously certified the union as the bargaining representative for appellant's employees under section 9(a) of the National Labor Relations Act, but has declined to exercise its jurisdiction to hear a substantially similar unfair labor practice charge filed under section 8 of that act.

STATEMENT OF THE CASE

Appellant is a Utah resident engaged in business in Salt Lake City under the trade name of Photo Sound Products Manufacturing Company as a manufacturer of specialized photographic equipment for the United States Air Force. The business during the period in question involved three Air Force contracts, one for chemical mixers in the amount of $84,896.73,

one for printers in the amount of $37,222.42, and one for print straighteners in the amount of $29,906.35. To perform these contracts for the Air Force, Photo Sound purchased from sources outside the state, stainless steel in an amount "a little less than $50,000". The finished products were shipped to the Air Force at Wright-Patterson Field, Dayton, Ohio and other Air Force bases, both inside and outside the state of Utah.

Shortly after the company started operating, the United Steelworkers of America, CIO, in December of 1953, filed with the National Labor Relations Board, a petition under sec. 9 of the National Labor Relations Act for certification of that union as the bargaining representative for all employees of the company, except clerical and supervisory employees, as defined in the national act. At the time for hearing on the petition on January 19, 1954, the company and the union entered into an agreement for a consent election to be conducted by the National Labor Relations Board. Among other things, this agreement recited that the employer, Photo Sound, was "engaged in commerce within the meaning of Section 2 (6), (7) of the National Labor Relations Act."

The election was conducted by the National Board on April 26, 1954 and was won by the union, 15 to 11. Under date of May 4, 1954, the United Steelworkers of America, CIO, was duly certified by the National Labor Relations Board pursuant to section 9 (a) of the National Labor Relations Act. (R. 1)

There ensued a period of charges and recrimina-

tions, interposed with collective bargaining sessions. Even before the first bargaining session, the union filed with the National Labor Relations Board, under sections 8 (a), (1), (3) and (5) of the National Labor Relations Act, a charge of unfair labor practices against Photo Sound. (R. 2-3) This charge was being investigated by the National Labor Relations Board during June and July, 1954, while the collective bargaining negotiations were in progress.

In July, 1954, the National Labor Relations Board issued new "yardsticks" which it indicated it would apply to determine whether it would, in a particular case, exercise the exclusive jurisdiction granted it by Congress. (NLRB Release No. R-445, July 1, 1954, and No. R-449, July 15, 1954). Applying this new yardstick, the National Board, through its Regional Director declined under date of July 21, 1954 to consider the matter of the charges filed by the United Steelworkers of America, CIO against Photo Sound, stating:

> "Further proceedings are not warranted, inasmuch as the operations of the company involved are predominately local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction. I am therefore, refusing to issue complaint in this matter." (R. 4)

The union, in this notice, was advised that it had the right to a review of this action by the National Board in declining to exercise its jurisdiction. No such appeal was taken.

On July 30, 1954, the union filed substantially the same charge with the State Board that it had pre-

viously filed with the National Board (R. 5-6). No complaint was issued by the Board until January 14, 1955 and notice of hearing thereon issued the same date.

At the hearing on the charges before the State Board on February 7, 1955, the company presented its contention that the matter was not within the jurisdiction of the Utah Board, but within the exclusive jurisdiction of the National Labor Relations Board, (R. 9) and objected to the introduction of all evidence and other proceedings on the same grounds. (R. 11) At the close of the union's case, the company renewed its motion to dismiss on the ground that the proceedings were not within jurisdiction of the National Labor Relations Board. (R. 14) Ruling was reversed on the issue by the hearing examiner. (R. 14)

The hearing examiner ruled that the business of Photo Sound affected intrastate as well as interstate commerce and concluded therefrom that the State Board had jurisdiction. (R. 17-18) Appellant filed its exceptions claiming the matter was exclusively within the jurisdiction of the National Board and that the National Board had not ceded such jurisdiction. (R. 22) The Utah State Labor Relations Board affirmed the ruling of the hearing examiner and issued an order directing Photo Sound to cease and desist from refusing to bargain collectively with the CIO and directing it to take certain affirmative action with respect to certain of its ex-employees designated in the order (R. 18-21).

After a motion for rehearing based upon the same contention, that section 10 (a) of the national act

precluded state action (R. 22) was denied, a Writ of Review was obtained from the Supreme Court of Utah upon a petition alleging that:

> "Contrary to the specific grant of exclusive power to the National Labor Relations Board under this Act, the Utah Labor Relations Board has entertained a charge filed with it by the United Steelworkers of America, CIO and issued a complaint thereon against Petitioner. That despite the contentions of Petitioner concerning the lack of jurisdiction of said Board, said Board, under date of June 21, 1955, issued its decision and order relating to the labor relations of Petitioner and on June 29, 1955, denied Petitioner's motion for rehearing. At all times herein Petitioner has contended said Board was wholly without authority or jurisdiction to act in the matter." (R. 23)

The only issue briefed or argued to the Supreme Court of Utah was the federal constitutional question. The posture of the case before the Utah Supreme Court was thus stated in its opinion as follows:

> "The employer obtained this Writ of Review for the purpose of questioning the jurisdiction of the Utah Labor Relations Board. The sole question before us is whether the state board may act in relation to a business admittedly engaged in interstate commerce and subject to the National Labor Relations Act and the National Labor Relations Board when that Board declines, upon the grounds stated, to exercise jurisdiction." *Guss* v. *Utah Labor Relations Board*, 296 P. 2d 733, 734.

The Supreme Court of Utah, relying on the views of the California court in *Garmon* v. *San Diego Bldg. Trades Council*, 291 P. 2d 1, cert. granted 5/7/56,

#50, Oct. Term 1956, held that the State Board had jurisdiction and affirmed its order. Rehearing was denied and this appeal was taken under 28 U.S.C. 1257 (2).

SUMMARY OF ARGUMENT

(1) The industry in which appellant is engaged —the manufacture of specialized photographic equipment for the United States Air Force—is clearly one affecting interstate commerce. The trial examiner for the Utah Board so found (R. 16) and the Utah Board adopted his findings (R. 19). As such, the National Labor Relations Act applies and the National Board has exclusive jurisdiction over his labor relations. *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U.S. 767, 91 L ed. 1234 (1946); *LaCrosse Telephone Co.* v. *WERB*, 336 U.S. 18, 93 L ed. 463 (1948) and *Plankinton Packing Co.* v. *WERB*, 338 U.S. 953 (1950). The particular acts charged are those with which the national act expressly deals (29 U.S.C. 158 (a) (1), (3) and (5). The only reason the National Board refused to act was because it adopted, during the course of the case, new "jurisdictional yardsticks" self-limiting the exercise of its jurisdiction to industries it considered would more nearly "effectuate the policy of the Act to exercise jurisdiction".

(2) Congress prescribed in section 10 (a) of the National Labor Relations Act, as amended in 1947, the exclusive method of ceding jurisdiction to state boards in cases involving borderline industries insofar as affecting interstate commerce is concerned. "And

when state enforcement mechanisms so helpful to federal officers are to be excluded, Congress may say so, as in the Taft-Hartley Act (29 U.S.C. 160 (a)", *California* v.*Zook*, 336 U.S. 725, 732, 93 L. ed. 1005, 1001 (1949). The Utah act does not meet the requirements of section 10 (a) because of numerous differences between the Utah act and the national act in parallel provisions relating to certification of unions as the collective bargaining representative and the prevention of unfair labor practices. Since the National Board cannot cede jurisdiction pursuant to the national act, it cannot achieve the same result by merely abdicating its jurisdiction for budgetary or other internal policy reasons. The potentiality of conflict with the National Board as expressed in the National Labor Relations Act and the decisions of this Court still remains.

(3) The assumption of jurisdiction by the Utah Board and the Utah Supreme Court on the basis that otherwise labor relations in the tidelands area, in which appellant's business falls, will go unregulated is not warranted under the terms of the national act. The problem of avoiding an inequitable result due to the abdication by the National Board of its responsibility and the consideration of the wisdom of Congress in its solution of the problem are not appropriate subjects for judicial inquiry. This is a matter for consideration by the Congress. Until Congress changes the law or remedies the National Board's budgetary problems, the supremacy and commerce clauses of the Constitution preclude state action.

ARGUMENT

POINT I

THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OF THE LABOR RELATIONS OF PHOTO SOUND PRODUCTS MANUFACTURING COMPANY.

The judicial plowing of the field of federal-state relationship in the administration of labor relations since the enactment of the Wagner Labor Relations Act in 1935 and its amendment in 1947 makes it clear that the National Labor Relations Board has jurisdiction in this matter and that such jurisdiction of the National Board is exclusive, Congress having pre-empted the field, except for certain particular instances specifically spelled out in the Act.

Since early in NLRA history this court has held that Congress intended to exercise the full scope of its authority under the commerce clause in the labor relations field. In *NLRB* v. *Fainblatt*, 306 U.S. 601 83 L ed. 1014 (1939) this Court held the power of Congress to regulate interstate commerce is plenary and extends to all such commerce, be it great or small and that:

> "The Act on its face, thus evidences the intention of Congress to exercise whatever power is constitutionally given it * * * we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend upon any particular volume of commerce affected * * *"

The trial examiner of the Utah Labor Relations Board, without referring to the approximately $50,000.00 worth of purchase in interstate commerce of Photo Sound found:

> "It must be conceded that the Respondent is manufacturing products almost all of which are shipped outside the State of Utah. It is also true that a large amount of the dollars expended in performing these contracts are spent for labor and the purchase of material on a local level. It is thus apparent, that intrastate commerce as well as interstate commerce is affected by this dispute." (R. 16)

Since the Utah Board adopted this finding that interstate commerce as well as intrastate is affected by the dispute between Photo Sound and the CIO (R. 18), it is clear that the labor relations of Photo Sound Products Manufacturing Company, and particularly charges of coercion, discrimination and refusal to bargain, matters expressly dealt with by sections 8 (a) (1), (3) and (5) of the national act, are within the National Board's exclusive jurisdiction. *NLRB* v. *Fainblatt*, supra, *Consolidated Edison* v. *NLRB* 305 U.S. 197, 83 L ed. 126 (1938), *Santa Cruz Packing Co.* v. *NLRB*, 303 U.S. 453, 82 L ed. 954 (1938).

The National Board itself asserted jurisdiction to conduct an election among appellant's employees and, pursuant to section 9 (a) of the National Labor Relations Act, certified under date of May 4, 1954, that a majority had chosen United Steelworkers as their representative (R. 1) Only two weeks later the union filed with the National Board an unfair labor practice charge asserting violations of sections 8 (a) (1), (3) and (5) of the National Labor Relations Act and alleging particularly interference with the employees' right of union membership as guaranteed by section 7 of the national act, discriminatory discharges

and refusal to bargain collectively (R. 2 and 3).

It is submitted that this Court has clearly established that the National Board's jurisdiction attaching, such jurisdiction is exclusive. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 91 L ed. 1234 (1946), *LaCrosse Telephone Co.* v. *WERB*, 336 U.S. 18, 93 L ed. 463 (1948) and *Plankinton Packing Co.* v. *WERB*, 338 U.S. 953 (1950).

In the *Bethlehem Steel* case, the issue of the federal-state relationship was first adjudicated. The issue there was whether the New York Board could certify a foreman's union in an industry subject to the National Labor Relations Act where the National Board had refused to certify such union as a matter of Board policy. This Court held that certification of such union by the State Board was invalid as in conflict with the national act and the commerce clause of the Constitution. In so holding the Court stated:

> "Comparison of the state and federal statutes, will show that both governments have laid hold of the same relation for regulation, and it involves the same employers and the same employees. Each is delegated through administrative authority, a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections, and determining the appropriate unit for bargaining in in the same plant. * * * We therefore conclude, that it is beyond the power of New York to apply its policies to these Appellants, as attempted herein."

In *LaCrosse Telephone Co.* v. *WERB*, supra, the

Supreme Court of Wisconsin had held that the Wisconsin Board could exercise its jurisdiction to determine and certify appropriate bargaining units until the National Board undertook to act. This Court rejected this view on the authority of the *Bethlehem Steel* case, stating that since the employer in question was subject to the act and regulation by the Board, the situation was "too fraught with potential conflict to permit the intrusion of the state agency even though the National Board had not acted" (330 U.S. at 25) and that "the uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy."

The *Plankinton Packing Co.* case was one involving unfair labor practices, rather than certification of appropriate bargaining units. This court, in a *per curiam* decision, citing the *Bethlehem Steel* and *La-Crosse Telephone Company* cases, held the Wisconsin Board to be without jurisdiction in such a matter.

In *Garner* v. *Teamsters Union*, 346 U.S. 485, 98 L ed. 228 (1953), the same principle was applied to state courts as was to state boards in the *Bethlehem Steel* and *LaCrosse Telephone* cases, and this Court held that the Pennsylvania court had no jurisdiction to enjoin picketing practicies which were in violation of both state and federal law, stating:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investiga-

tion, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. *The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the Federal Board, precludes state courts from doing so.* Cf. *Myers* v. *Bethlehem Shipbuilding Corp.* 303 U.S. 41 82 L ed. 638, 309 U.S. 261, 84 L ed. 738, 60 S. Ct. 561. And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the Federal Board also exclude state courts from like action. Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 91 L ed 1234, 67 S. Ct. 1026.

Of particular pertinence here, where the union first called upon the National Board to determine its jurisdiction is this Court's statement in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481, 99 L ed. 546 (1955) quoted with approval by this court in *Local Union No. 25* v. *New York, N. Y. & H. R. Co.* 350 U.S. 155, 100 L ed. Adv. p. 164, 168 (1956):

"But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections

prohibiting these practices, and where the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

After "carefully investigating and considering" the charge filed with it (R. 3), the National Board, under date of July 21, 1954, advised the complaining union that further proceedings were not warranted "inasmuch as the operations of the company involved are predominantly local in character and it does not appear that it would effectuate the policies of the Act to exercise jurisdiction." The Board further advised the union that pursuant to National Labor Relations Board rules and regulations it might obtain a review of the action by filing a request for such review within ten days of the receipt of the letter. No appeal was taken by the union from this refusal to act by the National Board. However, a week later the union filed a charge with the Utah Board alleging the same acts of interference with the right of the union membership, discriminatory discharges and refusal to bargain. (R. 5)

The only issue here is whether the actions of the National Board in declining to excercise its jurisdiction "to prevent any person from engaging in any unfair labor practice affecting commerce" conveys to or creates any jurisdiction in the Utah State Board. It is appellant's position that under the terms of the National Labor Relations Act and the commerce clause of the Constitution of the United States such refusal to assert jurisdiction neither does, nor can do so.

POINT II

THE PROVISIONS OF SECTION 10 (a) OF THE NATIONAL LABOR RELATIONS ACT PRECLUDE THE UTAH BOARD FROM ASSERTING JURISDICTION.

A. THE NATIONAL LABOR RELATIONS BOARD HAS NOT CEDED JURISDICTION.

Section 10 (a) of the National Labor Relations Act as amended 1947 provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; provided, that the Board is empowered *by agreement with any agency of any State or Territory* to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, *unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.* (emphasis supplied)

There is no contention here that the National Board has entered into an agreement with the Utah Board to cede its jurisdiction. In the *LaCrosse Telephone* case this Court referred to this provision and stated:

> "The result we have reached is not changed by the Labor Management Relations Act of 1947. That Act grants the National Board authority, under specified conditions to cede its jurisdiction to a state agency, but it does not

appear that there has been any cession of jurisdiction to Wisconsin by the National Board in any representation proceeding."

As a matter of fact, the National Board cannot cede jurisdiction. The Board itself advised this court in a memorandum filed in connection with *United Construction Workers* v. *Laburnum*, 347 U.S. 656, 98 L ed. 1025 (1954) quoted in a footnote at page 659 of that case, that it is:

> ". . . not feasible under the limitations prescribed by the Act to consummate agreements ceding jurisdiction under the proviso in section 10 (a)."

The reason for such inability is, of course, that neither the Utah act nor any other state act is sufficiently consistent with the national act to enable the Board to meet the proviso of section 10 (a). For example, the following are some of the inconsistent provisions in the Utah and the national acts with respect to the very issues involved in the case at bar.

Starting with the very determination of an appropriate bargaining unit, the acts are inconsistent. Section 9 (b) of the federal act gives the National Board the power to determine the appropriate unit, provided:

> "That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees

in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Section 34-1-9-7(b) of the Utah act contains no such limitation on the Utah State Board. Accordingly, inconsistencies could very well arise between two competing industries in Utah as to the composition of groups of their employees for various representative purposes, depending upon which board has jurisdiction and which made the determination of the appropriate unit.

Under the federal act, sections 9 (f), (g) and (h) require a union to file with the National Board financial statements and reports and non-communist affidavits of its officers before the Board may assert its jurisdiction at the request of such a union. See *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, 100 L ed. Adv. p. 514 (1956). No such condition precedent is present in the Utah act.

Section 34-1-8 (2) of the Utah act defining unfair labor practices of employees individually or in concert with others, added to the Utah section in 1947, differs substantially from section 8 (b) of the federal act defining unfair labor practices of a labor organ-

ization or its agents. See Appendix A for a section by section comparison.

Under the Utah act, (Sec. 34-1-8 (1) (e)) it is an unfair labor practice for an employer to bargain collectively with representatives of less than a majority of his employees in a collective bargaining unit. No such provision appears in the federal act.

The national act (section 8 (d)) requires sixty days' notice of termination of a collective bargaining agreement and prohibits a strike or lockout for a period of sixty days' after such notice, or until after expiration of the contract, whichever is later. No such provision appears in the Utah act.

From this brief outline and comparison of the provisions of the state and federal statutes pertaining to certification of a union as the collective bargaining representative for units of employees and defining unfair labor practices of labor and management, it is clear that the Utah act does not meet the requirements for cession of jurisdiction set forth in the proviso to section 10 (a) of the National Labor Relations Act.

It is equally clear that while the National Board's jurisdictional yardstick may remove the possibility of conflict over jurisdiction between the Utah and the Federal Board—at least until the National Board changes its yardsticks or some court determines the yardsticks are an abuse of discretion, in a particular case, (cf. *Street Railway Employees* v. *NLRB*, ... F. 2d ...., 39 L.R.R.M. 2001 (D.C. Cir. 1956)), the potential conflict and inconsistencies between the two acts as well as the uncertainty as to how long the National Board will abandon the field still remains.

Thus the reason for the *Bethlehem* rule as well as the clear mandate of Congress in section 10 (a) of the national act forbids state action.

B. THE REFUSAL OF THE NATIONAL LABOR RELATIONS BOARD TO EXERCISE ITS JURISDICTION DOES NOT CREATE JURISDICTION IN THE STATE BOARD.

Under the authorities cited and quoted above, it is incontravertible that the National Board would and does have jurisdiction in this matter. The only new fact in the case is that the National Board, midway in its handling of the labor relations of Photo Sound, for budgetary or other reasons, best known to the board, changed its policy and declined to exercise its jurisdiction in this and other cases involving businesses the size and nature of Photo Sound. It has not, by the adoption of these new standards or "yardsticks", held that it no longer has jurisdiction.

Even prior to the 1947 amendments to the Wagner Act, the National Board had, on a case by case basis, refrained from asserting jurisdiction over matters affecting essentially local operations. Compare, for example, the apparent inconsistent exercise of jurisdiction by the National Board over the May Department Stores Co. in St. Louis, Missouri, (*NLRB* v. *May Dept. Stores Co.*, 146 F. 2d 66 (8th Cir., 1944)) where no state board was in existence and the assertion of jurisdiction by the New York State Board over R. H. Macey & Co., Inc. (In re R. H. Macey & Co., Inc., et al, 21 L.R.R.M. 1091 (1948)). The appendix to the separate opinion of Mr. Justice Frankfurter in *Bethlehem Steel Co.* v. *N. Y. State Labor Relations*

Board, 330 U.S. 767, 784 gives a documentary outline of the understanding between the National and State Boards in New York prior to the 1947 amendments.

The Board's policy in this respect is stated in its opinion in *Breeding Transfer Co.* 110 NLRB 493, 35 L.R.R.M. 1020 (1954):

> "It has been the consistent position of the Board that it better effectuates the purposes of the Act, and promotes the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have a pronounced impact upon the flow of interstate commerce. In futherance of that policy, the Board in October 1950 adopted certain standards to govern its assertion of jurisdiction. Those standards resulted from a study of the Board's experience up to that time."

These standards and the reasons therefor, were announced by the Board in a press release dated October 5, 1950, (26 L.R.R.M. 51) as follows:

> "The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.
>
> "The Board has long been of the opinion that it would better effectuate the purposes of the act and promote the prompt handling of major cases, *not to exercise its jurisdiction to the fullest possible extent under the authority delegated to it by Congress, but to limit that exercise* to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should in our opinion be maintained.

"The Board thereby reiterated its policy *of not exercising jurisdiction despite its power to do so* over businesses so local in character that a sufficient impact upon interstate commerce *to justify an already burdened Federal Board in expending time, energy and public funds.*" (emphasis supplied)

The right of the National Board to use discretion in determining whether to exercise its jurisdiction under such yardsticks has been upheld, *Haleston Drug Stores* v. *NLRB*, 187 F. 2d 418 (9th Cir. 1951), and has been recognized in a dictum by this court in *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 94 L ed. 1284 (1951) where it was said:

"Even when the effect of the activities on interstateinterstate commerce is sufficient to enable the Board to take jurisdiction of a company, the Board sometimes properly declines to do so, stating that the policy of the Act would not be effectuated by its assertion of jurisdiction in that case." p. 684.

In 1954, effective July 1 and July 15 of that year, the National Board made an announcement of a revision of its yardsticks which affected its discretion to exercise its jurisdiction. In that press release the Board stated:

"The National Labor Relations Board today announced seven changes in its standards for determining whether the Board will take jurisdiction of a case. The earlier standards were adopted in October, 1950. The Board has discretion in which cases of those affecting interstate commerce it will exercise jurisdiction."

An account of the basis for the 1954 changes and a defense of the position of a majority of the Board

is contained in *Breeding Transfer Company*, 110 NLRB 493, 35 L.R.R.M. 1020, 1021 as follows:

> "Early this year, the Board undertook to study and reappraise the 1950 jurisdictional standards in the light of the Board's experience since their adoption and also in the light of changing economic conditions. Based upon that study and reappraisal, it is our opinion that the jurisdictional standard enunciated in Red Cab, Inc. should be revised so that the Board's long-established policy of limiting the exercise of its jurisdiction to enterprises whose operations have, or at which labor disputes would have a pronounced impact upon the flow of interstate commerce can be better attained.
>
> * * * *
>
> "The fact is that this Board, since the earliest days of the Wagner Act, has operated on the premise, which has Court and Legislative approval, that the Board has discretion to determine the circumstances under which it will exercise its jurisdiction over labor disputes. Prior to 1950, this discretion was exercised on a case-to-case basis, but it is a matter of history that the Board for years refused to assert jurisdiction over many establishments, such as retail stores, hotels, restaurants, taxicabs, local transit companies, and even the entire construction industry. In 1950, this *ad hoc* basis of exercising jurisdiction was abandoned in favor of a codified jurisdictional plan—adopted without a dissenting voice on the Board—which imposed fixed dollar volume limits upon the enterprises over which the Board would assert its jurisdictional power. This 1950 plan, like the present one, drew a line short of the legal limits of the Boards jurisdiction.

It was only after this latest revision of its yardsticks that the National Board declined to assert its jurisdiction over the unfair labor practice charges

filed with it by the United Steelworkers against Photo Sound.

The true nature of this exercise of discretion not to act was made clear by the First Circuit in *NLRB* v. *Kobritz, etal,* 193 F. 2d 8 (1st Cir., 1951). In that case the employer contended that because the Board had declined to assert jurisdiction in the past, it could not now do so in the application of a different administrative policy. The court said:

> "*The simple answer to this is that the Board has jurisdiction all the time. National Labor Relations Board* v. *Jones and Laughlin,* 301 U.S. 1. The Board's exercise of discretion here does not enlarge or exceed its jurisdiction so as to prejudice this respondent, since the acts complained of, if proved, would violate the act and redress can be procured under it." p. 138.

cf. *U.S.* v. *Morton Salt Co.* 338 U.S. 652, 647, 94 L ed 501 (1949)

While the Board has some discretion as to whether it should exercise its power to the full extent that Congress has granted it, there are limits on that discretion that make it clear that the boundaries set by the self-imposed yardsticks are not fixed and that its exclusive jurisdiction is a continuing one. These yardsticks must be "correct" in evaluating the impact of the dispute on interstate commerce. *Joliet Contractors Assoc.* v. *NLRB,* 193 F. 2d 833 (7th Cir. 1952). The board may not abandon a proceeding in midstream because of its changed jurisdictional standards so as to leave stranded an employee who testified in response to the Board's subpoena. *Pedersen* v. *NRLB* 234 F. 2d 417 (2nd Cir. 1956). Nor may it control its discretion by standards that are arbitrarily fixed,

but it must hear the complainant on the validity of the standard as applied to a particular case. *Street Ry. Employees* v. *NLRB*, ...F. 2d ...., 39 L.R.R.M. 2001 (D. C. Cir. 1956).

While for some statutory reasons the Board may not act in a particular case, nevertheless, the door is not open to state jurisdiction. (*Local Union #25*, v. *New York, N. H. & H. R. R.*, 350 U.S. 155, 100 L ed. Adv. 164 (1956), *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, 100 L ed. Adv. 514 (1956). As stated by this Court in the latter case:

> "Such elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act, as amended, and does not settle the issue as to the right of the state court to enjoin the employees and their union from peacefully picketing the employer's plant for the purpose of securing recognition.
>
> "The industrial relations between the company and its employees nonetheless affect interstate commerce and come within the field occupied by the National Labor Relations Act, as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them." 100 L ed. (adv.) p. 521.

These cases all make it clear that the national Act applies all the time to unfair labor practices affecting interstate commerce and that the complainant is not foreclosed merely by the action of the regional director in refusing to issue a complaint because of a change by the Board in its yardsticks. The Steelwork-

ers Union in the case at bar did not pursue the invitation to appeal the dismissal within the Board's administrative procedure, much less seek court review. Instead, it asked the Utah Board to assert its jurisdiction—a jurisdiction appellant contends does not exist.

Congress, when it revised the Wagner Act by enacting the Labor Management Relations Act in 1947, was not unaware of the problem created by the National Board's attempt to self-limit the exercise of the broad power granted it by Congress and the implications of such policy created by the decision of this court in the *Bethlehem Steel* case.

As pointed out by this court in *Amalgamated Assoc. of Street, Electric and Railway Employees* v. *WERB*, 340 U.S. 383, 95 L ed. 364 (1951):

> "When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 91 L ed. 1234, 67 S. Ct. 1026 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the act covers in so far as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare

invalid state regulation which impinges on that legislation." 340 U.S. 383, 397.

In the first place, no change was made in the broad jurisdictional language of the 1935 act which this court has held was coextensive with the constitutional power of Congress over commerce. *NLRB* v. *Fainblatt*, supra. It specifically did not set quantitative limits to the act's coverage such as the Board has used in the development of its self-restrictive yardsticks.

In the second place, the general language of the proviso to section 10 (a) referring to labor disputes affecting interstate commerce, but occurring in industries "predominantly local in character"—the very field in which the Board has, for budgetary reasons, declined to act (*Breeding Transfer Co.*, supra) indicates Congress intended to continue the application of the National Act in such fields. No statutory provision for ceding jurisdiction would have been necessary if the federal law did not extend coverage to the full extent of its constitutional power. Congress having made a "legislative affirmative description" of the method wherby jurisdiction could be ceded to the states, a denial of any other method is implied. *Continental Casualty Co.* v. *U.S.*, 314 U.S. 527, 86 L ed. 426 (1942).

In section 10 (a) of the 1947 act, Congress dealt with the situation expressly. As this Court has pointed out in *Algoma Plywood & Veneer Co.* v. *WERB*, 336 U.S. 301, 313, 93 L ed. 691 (1949), the purpose of the proviso in section 10 (a) was:

"* * *to meet situations made possible by

Bethlehem Steel Corp. v. *New York State Labor Relations Bd.* 330 U.S. 767, 91 L ed. 1234, 67 S. Ct. 1026, where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction. See H.R. Rep. No. 245, 80th Cong. 1st Sess. 40; S. Minority Rep. No. 105 p. 2, 80th Cong. 1st Sess. 38."

The decision in the *Bethlehem* case was handed down on April 7, 1947. Ten days later, the Senate Committee reported out S. 1126, containing the following proviso to section 10 (a).

> Provided, that the Board is empowered by agreement with any agency of any State or Territory to concede to such agency jurisdiction over any cases in any industry, other than mining, manufacturing, communications, and transportation, except where predominantly local in character even though such cases may involve labor disputes affecting commerce, provided the State agency conforms to national policy, as herein defined, in the determination of such disputes."

In conference, the word "concede" was changed to "cede" and the phrase "provided the State agency conforms to national policy, as herein defined, in the determination of such disputes", was changed to read: "unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The Senate Report stated (S. Rep. No. 105 on S. 1126, p. 26): "Section 10 (a): The proviso which has been added to this subsection permits the national Board to allow State labor-relations boards to take

final jurisdiction of cases in border-line industries (i.e., border line insofar as interstate commerce is concerned), *provided the State statute conforms to national policy.*" In the same report, the minority of the Committee said (p. 38):

> "(c). Concessions of Federal jurisdiction to States.—Section 10 (a) adds a proviso to the present act empowering the Board to concede to any agency of any State or Territory jurisdiction over any cases not predominantly national in character even though such cases involve an affect upon interstate commerce. We agree with the majority that it is desirable thus to clarify the relations between the National Labor Relations Board and the various agencies which States have set up to handle similar problems. This proposal is made necessary by the decision of the Supreme Court in *Allegheny Ludlum Steel Corp.* v. *William J. Kelley and H. Myron Lewis*, etc. decided on April 7, 1947 (330 U.S. 767).

The minority report went on to say "we think the clarification of relations between the Federal and State boards, contemplated under section 10 (a) a wise solution to a complex problem." (S.R. 105, Part II, p. 41, to accompany S. 1126, 80th Cong. 1st Sess.) In conference the Senate version of section 10 (a) was adopted. The Report of the Conference Committee, H. R. Rep. 510, H.R. 3020, 80th Cong. 1st Sess. at p. 52 states:

> (2) The Senate amendment contained a proviso at the end of section 10 (a) authorizing the Board to cede jurisdiction over any cases in any industry to State and Territorial agencies, subject to two conditions: (a) That it can cede jurisdiction in cases arising in mining, manufacturing, communications, and transportation only when the employer's operations are

predominantly local in character, and (b) that it may cede jurisdiction only if the applicable provisions of the State or Territorial statute and the rules of decision thereunder are consistent with the corresponding provisions of the National Act, as interpreted and applied by the Board and by the courts. The House bill contained no provision corresponding with the proviso of section 10 (a) of the Senate amendment. The conference agreement adopts this proviso."

These statements of congressional intent clearly indicate Congress desired state board action in "borderline industries" only insofar as the state statutes conform to national policy as expressed in the national act "in order to provide for uniformity in matters of national policy under the commerce clause". H.R. 245 on H.R. 3030, at p. 40.

As stated by this Court, one of the primary purposes of the framework of the national act was to minimize conflicts likely to result from variances of local procedure and attitudes toward labor controversies. *Garner* v. *Teamsters Union*, 346 U.S. 485, 98 L ed. 228 (1953).

Other examples of express congressional concern as to the role the states were to play in the area of labor relations regulations are section 8 (d), providing for notice to state mediation and conciliation agency in event of contract termination, section 14 (b) authorizing the so-called "right to work" legislation, section 202 (c) authorizing the director of the Federal Mediation and Conciliation Service "to establish suitable procedures for cooperation with state and local mediation agencies" and section 203 (b) directing such director "to avoid attempting to mediate disputes

which would have only a minor effect on interstate commerce if state or other comparable services are available to the parties."

No such direction is made to the National Board to abdicate its jurisdiction over unfair labor practices in favor of state agencies. The National Board may cede such jurisdiction only pursuant to the provisions of section 10 (a). If the Board's contraction of its activities by lengthening its yardstick gives the Utah Board power to act, it means that the National Board can do by abdication that which Congress has prohibited by agreement. It is submitted that no such result was intended by the Congress.

That this analysis of the national act is correct was confirmed by the decision of the Court of Appeals for the Tenth Circuit in *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659, (10th Cir. 1955) when that court said:

> "Moreover, the refusal by the NLRB to entertain the instant grievance on its merits did not of itself alter the pertinent law thereby revesting the state court with authority to proceeed. Amended Section 10 (a) of the Act specifically provides what this Court deems to be the only way state authorities can be vested with authority now within the exclusive purview of the Act. *Unless and until there is an express ceding of jurisdiction to a proper state agency, exclusive jurisdiction remains in the federal agency.* For sake of order such must be true. Otherwise, an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly preempted by Congress." (emphasis supplied).

To the same effect is the decision of the court in

the Ninth Circuit in *Capital Service, Inc.* v. *NLRB* 204 F. 2d 848 (9th Cir., 1953) that "we construe this amendment [to section 10 (a)] as giving to a state the right of enforcement only by an agreement reached by it with the Board. 204 F 2d 848, 855. (emphasis supplied)

It is further submitted that the language of section 10 (a) as thus construed with respect to New Mexico and California, where no state board exists, applies *a fortiori* to a state like Utah with a state board and a state labor relations act. It might well be argued that if the National Board refused to act by reason of its budgetary yardsticks, a state court in the exercise of its historic equity jurisdiction to grant relief where no other adequate remedy at law was available, might take jurisdiction to fill the void, subject, of course, to the limits prescribed by this court in *Weber* v. *Anheuser-Busch,* supra.[1] But a state board is proscribed expressly by section 10 (a) unless the state act spelling out its powers and the state policy on labor relations is consistent with the corresponding provisions of the national act and the National Board has ceded jurisdiction.

As this court pointed out in *Algoma Plywood* v.

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(1) Comparison should be made in this connection with *Garmon* v. *San Diego Building Trades Council,* 45 Cal. 2d 657, 291 P. 2d 1 (1955), cert. granted May 7, 1956, No. 50, October Term, 1956. There the California court asserted its jurisdiction when the National Board refused to act by reason of its jurisdictional yardsticks. The California court went on to find the union conduct a violation of section 8 (b) (2) of the National Act, (29 U.S. C. 158 (b) (2)) and granted an injunction. Thus the California Court applied the National Act. In the case at bar the Utah Board found the activities affected "intrastate commerce or the ordinary operation of industries within the State of Utah (R. 19)—the jurisdictional language of the Utah statute (34-1-10 (a), Utah Code Annotated, 1953) and applied the State Labor Relations Act even though the National Act is controlling. *United Mine Workers* v. *Arkansas Oak Flooring,* 351 U.S. 62.

WERB, supra, the phase "not consistent with the corresponding provisions of this Act" in the proviso "must mean that cession of jurisdiction is to take place only where state and federal laws have parallel provisions." 330 U.S. 313.

Congress apparently designed this provision as a club to induce state legislatures to correlate their acts with the national policy as set forth by Congress in the national act. Until the state legislature does so, the state board cannot succeed to the jurisdiction of the National Board. In the face of such a congressional mandate, the National Board cannot let in through the back door the state board which Congress barred through the front. Any other interpretation of section 10 (a) would render its proviso meaningless.

It is clear that this case does not come within the situation described in *Weber* v. *Anheuser-Busch*, supra, as an area "not susceptible of determination by fixed metes and bounds", nor as described in *Garner* v. *Teamsters*, supra as one in which "Congress has refrained from telling us". Here Congress has spoken expressly. State boards may not act unless the proviso of section 10 (a) is met. Utah has not modified its labor relations act to meet the requirements of Congress. Therefore, the Utah Board is precluded by the supremacy clause of the Constitution from acting in this case.

C. THE NATIONAL LABOR RELATIONS ACT HAS PRE-EMPTED THE FIELD.

In the case decided only last term, *Pennsylvania* v. *Nelson*, ...U.S. ...., 100 L ed. Adv. p. 415 (3rd Cir.

1956), this Court laid down the criteria, to be considered in determining whether in a given case, Congress has "prempted the field". It is submitted that applying these criteria in light of the past decisions of this court as to the federal-state relationship in the labor relations field, and in light of the express language of the Labor Management Relations Act, clearly indicates that the Utah Board is precluded in the instant case from asserting any jurisdiction.

The first test proposed in *Pennsylvania* v. *Nelson*, is whether "the scheme of Federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Rice* v. *Santa Fe Elevator Corp.* 331 U.S. 218, 230, 91 L ed. 1447 (1947).

We are, of course, in this context discussing the protection of both labor and management from the unfair labor practices of the other. Congress, in 1935, determined that it was necessary to enter the field of labor relations and with the Wagner Act set up an extensive administrative program for the protection of organized labor from discriminatory and coercive practices of management. It gave the Board authority to administer the program with powers coextensive with the constitutional power over interstate commerce. *NLRB* v. *Fainblatt*, supra. Among the specific acts prohibited both before and after the 1947 amendments, were coercion and other interference with the right of union membership (section 8 (a) (1)), discharges of those active in union affairs (section 8 (a) (3)) and refusal to bargain collectively (section 8 (a) (5)). These are the very acts with

which appellant was charged in both the NLRB proceeding (R. 2) and the state proceeding (R. 5). The statutory scheme for charge, investigation, hearing and appeal before the National Board and court review in the Court of Appeals, leaves no room for any supplementary action by the state in areas affecting interstate commerce. There can be no question that such a comprehensive and exclusive program of administrative action by the National Board meets the requirements of due process. *Myers* v. *Bethlehem Shipbldg. Corp.* 303 U.S. 41, 48, 82 L ed. 638 (1942). The only "room for supplement" could possibly come when the National Board, for budgetary or other internal reasons declined to assert its power and there Congress has spoken expressly with respect to the method of opening the door to state board action. It may come only if the proviso of section 10 (a) is met.

This court has already pointed out other areas where room is left for state action. In *Algoma Plywood & Veneer Co.* v. *WERB*, 336 U.S. 301, 93 L ed. 691 (1949), this court allowed the Wisconsin Board to act where no "parallel provisions" as to maintenance of membership clauses appeared in the national act. In *United Construction Workers* v. *Laburnum Constr. Co.* 347 U.S. 656, 98 L ed. 1025, (1954) this court allowed an action for damages based on violent conduct which the state court found to be a common law tort. In *United Automobile, Aircraft and Agricultural Implement Workers* v. *WERB*, 351 U.S. 266, 100 L ed. Adv. 666 (1956) this court recognized the power of the state board to stop violence or other injurious conduct which the court found the National Board was

without express power to regulate. In *International Union* v. *WERB*, 336 U.S. 245, 93 L ed. 651 (1949) this court upheld a state injunction against recurrent work stoppages on the ground that such conduct was neither prohibited nor protected by the national act and left open to state control.

With respect to unfair labor practices defined in the national act, this Court said in *Garner* v. *Teamsters, C & H Union*, 346 U.S. 485, 490:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. * * *"

The second test set forth in *Pennsylvania* v. *Nelson* is whether the Federal statute "touch [es] a field in which the Federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject." Congress itself, in section 1 (b) of the Labor Management Relations Act of 1947, stated its policy as follows:

> "(b) Industrial strife which interferes with the normal flow of commerce and with the

full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interferenc by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

and summed up its policy in the last paragraph of section 1 of the National Labor Relations Act as amended, as follows:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

As said by this court in *Weber* v. *Anheuser-Busch*, supra:

> "Controlling and therefore superseding federal power cannot be contemplated by the state even though the grounds for intervention be different than that on which federal supremacy has been exercised."

and in *Amalgamated Assoc. of Street, Electric & Ry. Employees AFL* v. *WERB*, 340 U.S. 416 (1951), this Court said:

> "When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 91 L ed. 1234, 67 S. Ct. 1026 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states.[1] Congress knew full well that its labor legislation 'preempts the field that the act covers in so far as commerce within the meaning of the act is concerned'[2] and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation."

The action of this Court with respect to certification of unions in *Bethlehem Steel Co.* v. *New York*

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(1) Section 10 (a) of the 1947 Act, 29 U.S.C. (Supp. II) § 160 (a). A proviso of § 10 (a) authorizes cession of jurisdiction to the states only where the state law is consistent with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong. 1st sess. 26 (1947). See also Minority views to same report, id. pt. 2 38, agreeing as to this feature of the legislation.

(2) H.R. Rep. No. 245, 80th Cong. 1st sess. 44 (1947).

State Labor Relations Board, supra, and in *LaCrosse Telephone Company* v. *WERB*, supra, and with respect to prevention of unfair labor practices in *Plainton Packing Co.* v. *WERB*, supra, re-enforces this position of dominance of the federal act.

The third test in *Pennsylvania* v. *Nelson* is that "enforcement of state * * * acts presents a serious danger of conflict with the administration of the federal program."

Heretofore this Court has recognized the preemption of the federal act where possibility of conflict might exist. It pointed out in the *Garner* case, supra:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." 346 U.S. 485 at 491;

and in the *Laburnum* case, supra, in referring to *Garner* v. *Teamsters*, supra, it was said:

> "To the extent that Congress prescribed preventative procedure against unfair labor practices, that case recognized that the act excluded conflicting state procedure to the same end." 347 U.S. 656, 665.

We have already demonstrated the differences between the federal and Utah acts dealing with unfair labor practices, and the rights and obligations of both union and management with respect to board protection. To prevent such conflicts, Congress enacted the proviso to section 10 (a). That proviso alone satisfies all three criteria of *Pennsylvania* v. *Nelson*. Until the requirements of that proviso are met, the National Board is the only body authorized by Congress to deal

with the prevention of unfair labor practices in an industry affecting interstate commerce.

POINT III

THE PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT CONTROL THIS ACTION, NOT THE ADVERSE AFFECTS OF THE NATIONAL BOARD'S JURISDICTIONAL YARDSTICKS

The Utah Supreme Court, in its decision below, indicated that its solution of the issue was motivated by the fact that "the values of immediate legal supervision of labor controversies within this company can only be maintained through state action" (R. 33).

In the present posture of the federal and state acts, such result is unfortunately true. The Utah Board found that five men had been discharged by appellant for union activities and that appellant had failed and refused to negotiate in good faith with the Steel Workers union as the representative of his employees (R. 19-20). If the state board cannot act and the national board will not act, no administrative remedy may exist to correct this situation. But that unfortunate result lies not at the door of either party to this action. Nor does such result warrant ignoring the plain import of the federal act.

The blame properly rests on the shoulders of Congress, the Utah Legislature and the National Labor Relations Board. Action by any one of them could have prevented the no-man's land of jurisdiction. This hiatus between the furthest reach of federal power over commerce granted by the federal act and the self-imposed restrictions enunciated by the National Board in its "jurisdictional yardsticks" was apparent from

the time of the decision of this court in *Bethlehem Steel* v. *N. Y. Labor Relations Board*, 330 U.S. 767 (1946). Congress met the problem with the proviso to section 10 (a) which even the minority report called "a wise solution to a complex problem." Since 1947, the Utah Legislature has had ten years in which to make its act consistent with the federal act so that the Utah Board could be ceded jurisdiction in the State of Utah. The Utah Legislature has done nothing to meet this situation.

In 1950 the National Board changed from the *ad hoc* basis of determining jurisdiction to the formula of jurisdictional yardsticks.

The enhanced dangers of the "jurisdictional tidelands" has since been pointed out in numerous legal articles,[1] and the problem was posed but not decided by this court in *Building Trades Council* v. *Kinard*, 346 U.S. 933, 98 L ed 423 (1954).

Despite such indications that this no man's land existed, the National Board, by lengthening its yardsticks in 1954 made the tidelands area, where no curbs on do-it-yourself management tactics existed, even larger.

Prof. Cox, in his article "Federalism in the Law of Labor Relations" 67 Harv. L. Rev. 1297, 1345, suggests that allocation of responsibility can best be made through inter-governmental agreements negoti-

(1) See Feldblam "Jurisdictional Tidelands in Labor Relations," Feb. 1952, L.L.J. p. 114; Cox and Seidman "Federalism and Labor Relations" 64 Harv. L. Rev., p. 211; Cox, "Federalism in the Law of Labor Relations," 67 Harv. L. Rev., 1297; Humphrey "The Changing Jurisdictional Standards of the National Labor Relations Board," 15 Fed Bar J. p. 30; Whitney, "NLRB Jurisdictional Policy in the Federal-State Relationship," Jan. 55 L.L.J. p. 3; Roche and Hanslow, "NLRB Absolutism - A Dogma Re-Visited," May, '55, L.L.J. p. 279. Turnbull, "Federal-State Jurisdictional Problems," Jan. '56, L.L.J. p. 5.

ated by the agencies concerned, similar to the type discussed in Mr. Justice Frankfurter's separate opinion in the *Bethlehem Steel* case. This, of course was the basis of the solution set up by Congress in section 10 (a) but with the additional proviso to insure a uniform national labor policy in areas affecting interstate commerce. Utah, in failing to meet the national policy, has only itself to blame.

Of course, the prime responsibility rests with the National Board in the establishment of its jurisdictional policy. Before abdicating its responsibility, it should have placed squarely before the Congress the alternative of increasing the Board's budget to meet the obligations placed upon it by the National Labor Relations Act, or of amending section 10 (a) to permit cession to the states.

Congress has, in fact, given consideration to the problem. Several attempts have been made to relieve the strict conditions of section 10 (a) on the freedom of the National Board to cede jurisdiction.[1]

The Senate Labor Committee, acting upon the recommendation of President Eisenhower, embodied the following provision in a proposed bill to amend the Taft-Hartley law.

> "Sec. 6 (b) (1) The Board, in its discretion, may decline to assert jurisdiction over any labor dispute where, in the opinion of the Board, the effect on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. (2) Nothing in this Act shall be deemed to prevent or bar any agency, or the courts of any State or Territory, from assuming

(1) See S 1264, 83rd Cong. 1st sess.; S 2218, 83rd Cong. 1st sess.; S. 2650, 83rd Cong. 2nd sess.

and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." (See S. Rep. No. 1211 on S.B. 2650, 83rd Cong. 2nd Sess. 28 (1954).

It is submitted that some such congressional action is the only solution. While results in individual cases may seem inequitable, such result is what Congress has ordained. It has deemed a uniform national policy more important than the risks incident to a jurisdictional no-man's land. Whether such determination is sound is, of course, not for this court, but for Congress to determine. Regardless of its limits on cession, the national law controls the situation, and the commerce and supremacy clauses of the Constitution preclude the application of state law.

On the other hand, consideration must be given to the adverse affects of a disregard of the requirements of section 10 (a) in yielding, as the Utah Supreme Court did, to the equities of a particular case. This would mean, of course, that Company A in Utah, whose volume of business was just over the top of the yardstick scale used by the National Board, would have its actions regulated by that Board. On the other hand, Company B whose volume is only a little less, would be subject to the Utah Board and the Utah act. Company B for example, would be subject to strike at the drop of a hat, while Company A would enjoy the protection of the sixty day notice requirement of the national act. Company A would have the protection against a communist dominated union given by section 9 (h) of the national act, while Company B might be required by the Utah Board, under the Utah

act, to bargain with such a union.

Consider also the interests of the employees of Company B. If they have a union shop contract, their employer could be forced to discharge them if their union membership was terminated because of some intra-union quarrel. Company A employees could be terminated for loss of union membership only for failure to pay dues. Under such circumstances which competitor will enjoy the more favorable labor relations? Certainly a work stoppage in Company B would just as much affect the free flow of commerce as one in Company A even though that flow was less in dollars.

In the second place, how long would the jurisdiction of the Utah Board last over Company B? The case at bar shows how, in a period of a few months, the National Board exercised jurisdiction to conduct a representative election, changed its standards and declined to assert jurisdiction over an unfair labor practice claimed to have arisen out of that very election. The confusion likely to result was pointed out by the Court of Appeals for the Tenth Circuit in *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659 (10th Cir. 1955) by quoting the following from *Universal Car and Service Co.* v. *IAM*, 35 L.R.R.M. 2087 (Mich. Cir. Ct., 1954):

> "If the jurisdiction of the state courts is to depend—not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political view at the moment, then neither the courts nor the

litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision." (p. 2098)

This Court need not decide which policy is preferable for Congress has made that choice for us. Section 10 (a) prescribes the only way in which jurisdiction over industries affecting interstate commerce can be ceded to a state board. Unless and until those requirements are met, the commerce and supremacy clauses of the Constitution preclude state action in this case.

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the Supreme Court of Utah is contrary to the provisions of section 10 (a) of the National Labor Relations Act, as amended, and the application of Utah law to the adjustment of an unfair labor practice in an industry affecting interstate commerce is contrary to the commerce and supremacy clauses of the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

Comparison of 34-1-8, Utah Code Annotated, 1953, with Title 29, § 158, U.S.C.A.

State (Unfair labor practices) Federal

34-1-8, UCA, 1953	Title 29, §158 U.S.C. (Sec. 8)
(1) It shall be an unfair labor practice for an employer, individually or in concert with others:	(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
(a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 34-1-8.	(a) It shall be an unfair labor practice for an employer—
(b) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; provided, that subject to rules and regulations made and published by the board pursuant to 34-1-7(a) an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.	(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
(c) By discrimination in regard to	(3) by discrimination in regard to hire or tenure of employment or any term or condi-

hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; provided, that nothing in this act shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this act as an unfair labor practice) to require as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 34-1-10 (a), in the appropriate collective bargaining unit covered by such agreement when made.

tion of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election

(d) To refuse to bargain collectively with

held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided* further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate

the representative of a majority of his employees in any collective bargaining unit; provided, that when two or more labor organizations claim to represent a majority of the employees in the bargaining unit the employer shall be free to file with the board a petition for investigation of certification of representatives and during the pendency of such proceedings the employer shall not be deemed to have refused to bargain.

(e) To bargain collectively with the representative of less than a majority of his employees in a collective bargaining unit.

(f) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act.

(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 34-1-8, or to

against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules

intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 34-1-8, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.

(c) To cooperate in engaging in, promoting,

with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159 (a) of this title;

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course

or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(d) To hinder or prevent, by mass picketing, threats, intimidation, force, or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(e) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion, or sabatoge, the obtaining, use or disposition of materials, equipment, or services; or to combine or conspire

of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if any other labor organization has been certified

to hinder or prevent the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(f) To take unauthorized possession of property of the employer.

as the representative of such employees under the provisions of section 159 of this title; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter;

(5) to require of employees covered by an agreement authorized under subsection (a)

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subsections (1) and (2) of this section.

(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force

or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate, disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the

terms and conditions of the existing contract, for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159 (a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified

in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Comparison of 34-1-9, Utah Code Annotated, 1953, with Title 29, § 159, U.S.C.

34-1-9 UCA, 1953	29 U.S.C.A. § 159 (Sec. 9)
(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer.	(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for th purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.
Appropriate Unit.	
(b) The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of this act, the	

unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Questions Affecting Intrastate Commerce.

(c) Whenever a question affecting intrastate commerce or the orderly operation of industry arises concerning the representation of employees, the board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 34-1-10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

Review - Transcript.

(d) Whenever an order of the board made pursuant to section 34-1-10 (c) is based in whole or in part upon facts certified follow-

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranted by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit; is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes together with other employees, any individual employed as a guard to enforce a-

ing an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 34-1-10 (e) or 34-1-10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the board shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript.

gainst employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or its affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) as-

sert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election

by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160 (c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selec-

tion between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to

be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158 (a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the pre-

ceeding twelve-month period, a valid election shall have been held.

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b), of section 160 of this title, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and

allowance of its three principal officers and of any of its officers or agents whose aggregate compensation and allowances for the preceding year exceed $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year; (3) the manner in which the officers and agents referred to in clause (2) of this subsection were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on

membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (1) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial re-

port required by paragraph (1) of this subdivision to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B) of this section. No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 160 of this title with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or con-

stituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor orgarization and the officers of any national or internationl labor organization of which is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal

34-1-10, UCA, 1953

(a) The board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 34-1-8) affecting intrastate commerce or the orderly operation of industry. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.

or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

Title 29, § 160 (a) (See 10 (a))

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute

applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.